(24)

HIGH COURT OF CHHATTISGARH AT BILASPUR

S.B. : HON'BLE SHRI JUSTICE VIJAY KUMAR SHRIVASTAVA

CRIMINAL REVISION NO. 105 OF 2007

APPLICANT — Tribhuvan, s/o. Ramkeshwar Singh Khairwar, aged about 22 years, r/o. village Chiniya, P.S. Ramanujganj, Dist. Surguja, CG.

Verus

NON-APPLICANT — State of Chhattisgarh, through SHO, P.S. Ramanujganj, Dist. Surguja, CG.

PRESENT:

Shri A.K. Prasad, counsel for the applicant.

Shri P.K. Verma, Addl. Public Prosecutor with Shri Satish Gupta, Dy. Govt. Advocate for non-applicant/ State

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ORAL ORDER

(Passed on 22nd March, 2007)

Heard on M(Cri)P.No.492/2007 and perused the record of Criminal Appeal No. 62/99 and Criminal Case No.329/95.

2) Learned counsel for the State did not oppose M.(Cri)P.No.492/2007 stating that the appellate Court did not consider that the applicant was absconding and without hearing the applicant learned appellate Court has passed the judgment.

3) Having considered the reasons assigned by the applicant for condonation of delay in filing the revision duly corroborated with an affidavit, and no objection of the State, M(Cr) P.No. 492/2007 is allowed and delay in filing the revision is condoned.

4) Having seen the illegality committed by lower appellate Court from the face of the record and also the oral prayer of both the parties to hear the revision finally and to dispose it of at this stage, the matter is heard finally.

5) Judicial Magistrate First Class, Ramanujganj, vide judgment of conviction and order of sentence dated 29-5-99 passed in Criminal Case No.329/95, convicted appellant and other co-accused persons namely Mangan, Ramlal, Vijay for committing offence punishable under Sections 457 and 380 of the IPC and sentenced each one of them to undergo RI for one year and to pay a fine of Rs.500/-, in default of payment of fine, to further undergo imprisonment for three months on each count. Feeling aggrieved, applicant and other convicted accused Mangal, Ramlal and Vijay challenged the legality of conviction and sentence in Criminal Appeal No. 62/99.

6) The appellate Court vide order dated 4-6-99 suspended the custodial sentence and passed an order to release the applicant and other convicted appellants. It appears that the applicant and other convicted appellants were released on bail after furnishing bail bonds. On 27-7-1999 the appeal was admitted for final hearing. Subsequently, applicant remained absent and till the judgment passed by the appellate Court, he did not appear. During pendency of the appeal, applicant was declared absconding and in appellate judgment also in cause title an entry showing absconding has been made and judgment was passed. Judgment was passed on 23-10-2003. Feeling aggrieved, the instant revision against the appellate judgment was filed on 26-2-2007.

7) Sections 380, 385 & 386 of the Cr.P.C. read as below:

> **"380- Special right of appeal in certain cases.-** Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect

of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

385. Procedure for hearing appeals not dismissed summarily.- (1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given-

(i) to the appellant or his pleader,

(ii) to such officer as the State Government may appoint in this behalf;

(iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;

(iv) if the appeal is under Section 377 or Section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties;

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground."

386. Powers of the Appellate Court.- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order.

(e) make any amendment or any consequential or incidental order that may be just or proper.

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

From bare reading of the above provision, it is evident that the applicant had independent as well as common right to challenge the legality of conviction and sentence passed by the trial Court and he availed it by filing an appeal along with other convicted persons. He remained absent during hearing as well during final hearing of the appeal and without hearing the applicant, appellate judgment was passed against him. In accordance with Section 386 of the Cr.P.C., the appellate Court has no jurisdiction to pass judgment without hearing the appellant or his pleader.

8) From the record of appellate Court, it is evident that applicant remained absent from 20-9-99 till disposal of the appeal. On 23-10-2003 appellate Court heard the parties. On that day, when hearing took

place, applicant was shown absconding and on the same day, judgment was passed and again in order sheet applicant was shown absconding. Even in appellate judgment in cause title, a noting has been made showing applicant absconding.

9) In view of the above, the judgment passed by the appellate Court dated 23-10-2003 sustaining the judgment of conviction and order of sentence passed by the trial Court do not bind the applicant and the applicant has a right of hearing. Therefore, lower appellate Court is directed to hear the appeal of the applicant after affording him proper opportunity of hearing and dispose of his appeal by passing an appropriate order. He shall dispose of the appeal preferably within a month from the date of receipt of copy of this order and record of both the Courts below.

10) Registry is directed to send forthwith a copy of this order along with the record of both the courts below.

11) The revision stands disposed of.

Sd/-
Vijay Kumar Shrivastava
Judge

Raju